United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

NO. 74-1651

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

RETIRED PERSONS PHARMACY t/a NRTA-AARP PHARMACY,

Petitioner,

v.

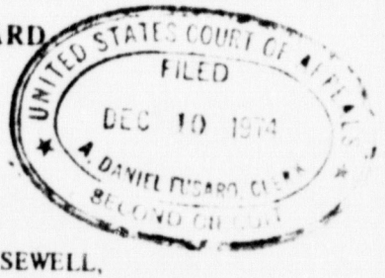
NATIONAL LABOR RELATIONS BOARD,

Respondent.

P/S

On Petition for Review and Cross-Application for
Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD



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On Petition for Review and Cross-Application for Enforcement of an Order of The National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Employer violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and by unilaterally changing the terms and conditions of employment of its pharmacist employees.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Employer violated Section 8(a)(1) and (5) of the Act by coercively questioning its employees.

3. Whether Section 10(e) of the Act precludes the Employer from raising issues relating to the Board's authorization of a Section 10(j) proceeding.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of Retired Persons Pharmacy t/a NRTA-AARP Pharmacy (hereafter "the Employer"), pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) to review and set aside the Board's order (A. 117a-118a, 89a-90a),[1] issued against the Employer on April 30, 1974. The Board has filed a cross-application for enforcement of that order.[2] The Board's Decision and Order are reported at 210 NLRB No. 65. The unfair labor practices occurred in Washington, D.C., where the Employer is engaged in the sale and distribution of pharmaceutical products. The Court has jurisdiction under Section 10 (e) and (f) of the Act, since the Employer maintains a mail order operation in East Hartford, Connecticut, and thus "transacts business" within this judicial circuit.

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[1] "A." references are to the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the typewritten briefs submitted by the Employer and the *amicus curiae.*

[2] By stipulation of the parties and order of this Court (October 25, 1974), the Chamber of Commerce of the United States of America was permitted to file a brief *amicus curiae.*

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Employer violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the incumbent Union representing its Washington, D.C. pharmacists, and by thereafter making unilateral changes in their hours of work. The Board rejected the Employer's defense to this unlawful conduct, ruling that it had not shown objective evidence warranting a reasonable doubt of the Union's majority status or competent proof of an actual loss of majority support. The Board also found that the Employer violated Section 8(a)(1) and (5) of the Act by conducting wide-ranging interrogations concerning its employees' union membership and activities. The evidence supporting these findings is set forth below:

A. Background: The Union is certified, negotiates a one-year contract, and actively represents unit employees.

In November 1971, the Board certified the Union[3] as the collective-bargaining representative of the "registered and/or graduate pharmacists" at the Employer's Washington, D.C. location (A. 73a; 32a). The pharmacists had voted 20 to 10 in favor of Union representation in the Board's representation election (A. 73a; 31a). After the Union's certification, the parties commenced negotiations for a collective-bargaining agreement (A. 73a; 135a-136a). However, a final agreement was not executed until September 1, 1972; the agreement was effective May 29, 1972 to May 29, 1973 (A. 73a; 136a, 46a). The agreement did not provide either for a "union shop" requiring employees to join the Union after 30 days, or

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[3] Metropolitan Guild of Pharmacists.

for the checkoff of union dues (A. 73a; 33a-47a). It did provide that employees who chose to become union members during the contract term would maintain their membership as a condition of employment (A. 33a-34a).

The Union and its employee members remained active during the contract term (A. 73a). Two pharmacists, John Meszaros and John Smith, were members of the Union's Board of Directors, the governing body for all represented units in the Union's geographic area (A. 73a; 176a-177a). These two pharmacists and other employees participated in many union meetings on and off the Employer's premises (A. 73a; 178a-179a). In the eight months following the execution of the agreement, there were at least six union meetings held during lunch or break periods on the Employer's premises; the meetings were generally attended by approximately 20 employees (A. 73a; 178a-179a, 197a-199a, 214a-215a). The Union's grievance committee adjusted a number of grievances with the Employer's pharmacist-manager, Paul Brault (A. 73a; 205a-211a). And the grievance committee, accompanied by representatives of the Union, met with Employer Manager Robert Altman to discuss grievances which the committee had not been able to resolve with Brault (A. 73a; 209a, 211a).[4]

During the term of the contract, the composition of the unit remained substantially unchanged (A. 73a). Twenty-four of the 28 employees in the unit on April 19, 1973 (when the Employer ceased recognizing

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[4] In view of this credited evidence of sustained, openly conducted union activity, the Board discredited Employer Manager Altman's testimony that he had reason to believe that the Union was dormant (A. 73a, 77a).

the Union) were employed at the time of the November 1971 election (A. 73a; 53a-55a, 57a).[5]

B. The Union requests negotiations for a new collective-bargaining agreement, but the Employer refuses to negotiate, claiming doubt of the Union's majority status.

In accordance with the terms of the parties' collective-bargaining agreement, Union Attorney Ira Lechner, by letter dated March 7, 1973,[6] notified Employer Attorney Robert Lewis of the Union's intent to terminate the agreement on its expiration date and to modify certain of its terms through collective-bargaining (A. 73a; 48a, 144a). After further correspondence, a meeting between Lechner and Employer Attorneys Lewis and Peggy L. Braden took place in Washington, D.C., on April 19 (A. 73a; 145a).

During this April 19 meeting, Lewis told Lechner that the Employer refused to confer and bargain with the Union, that the Employer doubted that the Union represented a majority of the employees (A. 74a; 145a-146a). Lechner was surprised and upset by Lewis' statement; in his view, the parties had developed a good bargaining relationship and there was no prior "hint" of such a response (A. 145a-146a). Lewis also indicated that the Employer intended to file a petition with the Board for another election (A. 74a; 147a). Lechner opposed such a course and asked Lewis what evidence the Employer had to support its expressed doubt of the

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[5] The list of employees furnished the Board in connection with the November 1971 election, contained 34 names (A. 53a-55a). Three of these employees were at that time supervisors whose ballots were challenged (A. 73a, n. 2; 239a-242a). Employer Baron was promoted to supervisory status after the election (A. 243a-244a).

[6] Hereafter, all dates are 1973, unless otherwise noted.

of the Union's majority (A. 74a; 146a, 147a). Lewis did not respond to Lechner's inquiry, stating only that the Employer had reason to believe that the Union did not represent a majority of the employees in the unit (A. 74a; 147a-148a). Since April 19, the Employer has refused to meet and bargain with the Union (A. 74a; 30a).[7]

On April 20, the Employer filed a representation petition with the Board (A. 74a; 51a, 30a). This petition was not accompanied by any evidence to support the Employer's expressed belief that the Union no longer had the support of a majority of the pharmacists (A. 74a; 222a).[8] The petition was dismissed on May 2 as untimely, since it was filed during the final 60 days or "insulated" period of the expiring contract (A. 74a; 49a-50a, 30a).[9] On May 8, the Union, through Lechner, again requested the Employer to meet and bargain, but the Employer, through Attorney Braden, again refused on the grounds that the Employer did not feel that the Union represented a majority (A. 151a). On May 14,

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[7] The Employer subsequently resumed bargaining pursuant to an order issued against it on October 26, 1973, in a Section 10(j) proceeding. *Humphrey v. Retired Persons Pharmacy*, 84 LRRM 2599 (D.D.C., 1973).

[8] In the case of employer-filed petitions (Section 9(c)(1)(B) of the Act) for units represented by an incumbent union, the Board requires "a statement of the objective considerations demonstrating reasonable grounds for believing that the labor organization has lost its majority support." Board Statements of Procedure, 29 C.F.R., Sec. 101.17. See also, *United States Gypsum Co.*, 157 NLRB 652, 656 (1966) (the employer ". . . must demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status since its certification.").

[9] The Board's "contract bar" rules provide that a collective-bargaining agreement, with certain exceptions not pertinent here, operates as a bar to an election unless the petition is filed more than 60 days, but less than 90 days, before the expiration of the contract. *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1001 (1962); *Bally Case and Cooler, Inc. v. N.L.R.B.*, 416 F.2d 902, 905 n. 1 (C.A. 6, 1969), cert. denied, 399 U.S. 910.

the Union filed an unfair labor practice charge alleging that the Employer had violated Section 8(a)(5) and (1) of the Act by refusing to meet and bargain with the Union (A. 74a; 5a). The charge was served on May 17 (A. 74a).

C. Attorneys for the Employer interview pharmacist employees about their union membership and activities.

On May 21, Attorneys Peggy L. Braden, G. Harrison Darby and Robert J. Giovannetti from the law firm which represents the Employer went to the Employer's Washington, D.C. location and interviewed 27 of the 28 unit employees (A. 74a; 30a). The attorneys read to each pharmacist a prefatory statement indicating that they represented the Employer, that the Employer did not "feel that the [Union] has the support of the pharmacists" and that the attorneys "therefore would like to ask . . . a few questions to assist in the preparation of a defense to unfair labor practice charges filed by the [Union]" (A. 74a; 91a). The employees were interviewed individually in private rooms away from the workplace, after being summoned from their work station by management representatives (A. 74a; 180a, 185a, 190a, 337a). The Employer attorneys told the employees that they did not have to answer any questions, that their jobs would not be affected, and that they could leave if they wished (A. 74a; 91a). The attorneys then asked the following 46 questions (A. 74a; 92a-93a):

Name
How long have you been employed at NRTA?
Are you a member of the Guild?
When did you become a member?
What did you do to become a member?
Do you actively support the Guild?
Are you presently paying monthly dues?
How much are the dues?

How do you pay these dues?
To whom do you pay these dues?
Were you paying dues in April 1973?
Were you paying dues before April 1973?
Were the dues ever increased?
Have you ever received an assessment?
When?
What was the assessment for?
How much was the assessment?
Does the Guild hold regular meetings?
How often are these meetings held?
Have you ever attended any of these meetings?
How often do you attend?
Did you attend meetings in April 1973?
Did you attend meetings before April 1973?
Does the Guild send out regular communications to its members?
What kind of communications are sent?
Have you ever received any communications from the Guild?
How many times?
Did you receive communications before April 1973?
Who is the President of the Guild?
Who are the other officers?
Who is your shop steward?
Do you know where the Guild is located?
If so, what is the address?
What is the telephone number of the Guild?
Do you have a copy of the Guild's Constitution and By-laws?
Where is this copy?
When did you get the copy?
Have you ever read the Constitution and By-laws?
When did you read it last?
What are the various provisions of the Constitution that you remember?
Do you know the terms of your contract with NRTA?
Do you have a copy of the contract?
Did the Guild ever tell you about the contract?
If so, when?
Do you know when the contract expires?
Have you ever had a grievance handled by the Guild?
Was the grievance handled satisfactorily?

Of the 27 unit employees called for interviews, 16 answered most or all of the questions (A. 74a; 30a). Upon learning of the questioning,

Union Attorney Lechner advised pharmacist Leise to instruct the employees to refuse to cooperate if they wished; but, if they feared reprisals, to comply but lie about their membership in the Union (A. 74a; 152a-154a, 180a-181a, 184a-185a). On May 22 the Union filed an unfair labor practice charge alleging the Employer's interviewing as a violation of Section 8(a)(1) of the Act (A. 71a; 6a).

D. The Employer unilaterally changes the work week of pharmacist employees.

In early May, Employer officials decided to reduce the work week of unit pharmacists by two hours (A. 74a; 273a-274a). This change was announced by Manager Altman to assembled pharmacists on May 30, the day after the collective-bargaining agreement expired (A. 74a; 276a-277a, 58a). This change was made without notice to, or bargaining with, the Union (A. 74a; 30a).

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board found that the Employer violated Section 8(a)(5) and (1) by withdrawing recognition from the incumbent Union on April 19, 1973, and by thereafter making unilateral changes in the employees' hours of work. The Board further found that the Employer's May 21 extensive questioning of the employees as to their union activities violated Section 8(a)(1) and (5) of the Act (A. 117a-118a, 77a-89a). The Board's order requires that the Employer cease and desist from the unfair labor practices found and from in any like or related manner interfering with its employees' exercise of their Section 7 rights. Affirmatively, the Board's order directs the Employer to bargain with the Union and to post appropriate notices (A. 117a-118a, 89a-90a, 94a).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION FROM THE UNION AND UNILATERALLY CHANGING THE WORK WEEK OF ITS PHARMACIST EMPLOYEES.

A. Introduction and applicable principles

In order to ensure the stability of established bargaining relationships and to prevent recurring interference with industrial peace, the Board and courts have carefully defined the circumstances under which an employer may lawfully withdraw recognition from a formally certified bargaining agent. Thus, it has long been established that, during the first year following such certification, when the collective-bargaining relationship must be allowed a "reasonable" opportunity to mature, the union's representative status is irrebuttably presumed to continue, absent special circumstances, and a withdrawal of recognition by the employer violates the Act. *Brooks v. N.L.R.B.*, 348 U.S. 96, 98-104 (1954). Following the certification year, the presumption of representative status remains in effect but becomes rebuttable. *Celanese Corp. of America*, 95 NLRB 664, 672 (1951), cited with approval, *N.L.R.B. v. Burns Security Services*, 406 U.S. 272, 279 n. 3 (1972) and *Brooks v. N.L.R.B., supra*, 348 U.S. at 104, n. 18. See also, *N.L.R.B. v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383 (C.A 2, 1973); *N.L.R.B. v. Midtown Service Co.*, 425 F.2d 665, 668 (C.A. 2, 1970); *N.L.R.B. v. Gulfmont Hotel Co.*, 362 F.2d 558, 589 (C.A. 5, 1966). To justify a withdrawal of recognition in the face of this presumptive representative status, the employer must affirmatively show either "that the union in fact no longer enjoyed majority support on the date of the refusal to bargain, or that the refusal to bargain was predicated upon a reasonably grounded good-faith doubt of majority support." *Terrell Machine Co. v. N.L.R.B.*, 427 F.2d 1088, 1090 (C.A. 4,

1970), cert. denied, 398 U.S. 929. See also, *Allied Industrial Workers, Local 289 v. N.L.R.B.*, 476 F.2d 868, 881 (C.A.D.C., 1973); *N.L.R.B. v. Cayuga Crushed Stone, Inc., supra*, 474 F.2d at 1382-1383. In other words, the presumption of representative status which accrues after the certification year establishes *prima facie* a continuing duty to bargain with the incumbent union; the burden is on the employer to demonstrate an actual loss of majority support or reasonably grounded good-faith doubt of the union's representative status.[10]

To establish a reasonably grounded "good-faith" doubt,[11] the employer is required to demonstrate "objective considerations" which give rise to a reasonable doubt of the union's majority status. *Terrell Machine Co.*, 173 NLRB 1480, 1481 (1969), enforced, 427 F.2d 1088 (C.A. 4, 1970); *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association*, 213 NLRB No. 74, pp. 2-4, 87 LRRM at 1195 (1974); *United Supermarkets, Inc.*, 214 NLRB No. 142, 87 LRRM 1434, 1435 (1974). The courts have endorsed this evidentiary standard, holding that the employer's doubt "must be more than a self-serving assertion" (*N.L.R.B. v. Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1091 (C.A. 8, 1969)), and may not "depend solely upon unfounded speculation or a subjective state of mind." *N.L.R.B.*

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10 The union's "representative status" is determined by whether "a majority of employees in the unit wish to have the union as their representative for collective-bargaining purposes." *Terrell Machine Co.*, 173 NLRB 1480, 1481 n. 3 (1969), enforced, 427 F.2d 1088 (C.A. 4, 1970).

11 "Good-faith" in this context means at least the absence of employer unfair labor practices contributing to the union's loss of majority. See, *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association*, 213 NLRB No. 74, p. 3, 87 LRRM 1194, 1195 (1974); *N.L.R.B. v. A.W. Thompson, Inc.*, 449 F.2d 1333, 1336-1337 (C.A. 5, 1971), cert. denied, 405 U.S. 1065.

v. Gulfmont Hotel Co., supra, 362 F.2d at 589. There must be a "reasonable basis to question in good faith the Union's majority status." *N.L.R.B. v. Cayuga Crushed Stone, Inc., supra,* 474 F.2d at 1382. See also, *N.L.R.B. v. Rish Equipment Co.,* 407 F.2d 1098, 1101 (C.A. 4, 1969) ("What is required is a 'rational basis in fact' "); *N.L.R.B. v. Frick Co.,* 423 F.2d 1327, 1331 (C.A. 3, 1970). In short, the ". . . refusal to bargain must clearly rest on more than an allegation of subjective good-faith doubt, easily made and difficult to refute. It must be founded in reason, and represent a doubt engendered by facts which provide some guarantee of objectivity." *Retail, Wholesale and Department Store Union v. N.L.R.B.,* 466 F.2d 380, 393 (C.A.D.C., 1972). And such objective basis "is not controlled, or even guided, by the later ascertained facts of union adherence and non-adherence. It is rather the question of fact whether the company had a reasonable basis *at the time of its refusal to bargain* for believing that majority support of the bargaining union no longer existed." *N.L.R.B. v. Gulfmont Hotel Co., supra,* 362 F.2d at 589 (emphasis supplied). See also, *Terrell Machine Co. v. N.L.R.B., supra,* 427 F.2d at 1090 ("Because Terrell did not know of the actual minority of union members until after its refusal to bargain, it cannot rely on that data to support a good-faith doubt of continued majority support").

With respect to actual loss of majority support, the Board requires "affirmative proof" by "competent evidence" that at the time of withdrawal of recognition, a majority of unit employees no longer want the union to represent them *Orion Corp.,* 210 NLRB No. 71, p. 2, 86 LRRM 1193, 1194 (1974), review pending in C.A. 7, No. 74-1432; *Automated Business Systems,* 205 NLRB No. 35, p. 8, 84 LRRM 1042, 1045-1046 (1973), enforcement denied, 497 F.2d 262 (C.A. 6, 1974). This evidentiary requirement is based on the union's presumption of majority status which, following the certification year, may be rebutted, but only by "clear, cogent and convincing evidence." *N.L.R.B. v. Tragniew, Inc.,*

470 F.2d 669, 674-675 (C.A. 9, 1972).[12] This Court implicitly adopted the Board's evidentiary standard in *N.L.R.B. v. Gallaro*, 419 F.2d 97, 101 (C.A. 2, 1969), where it was found that "a majority of the employees had plainly and on reliable evidence signified that they no longer wanted the union to represent them and . . . there was no evidence that the employer had instigated, encouraged, or influenced the employees' rejection of the union." See also, *N.L.R.B. v. Midtown Service Co.*, 425 F.2d 665, 669 (C.A. 2, 1970) (the union's 111 to 94 defeat in a decertification election "convincingly rebutted" the presumption of majority status). In sum, in order to withdraw recognition on grounds of actual loss of majority, the employer must demonstrate through reliable, convincing proof that a majority of the employees have repudiated the union as their bargaining representative.

These evidentiary standards represent a sound implementation of the statutory policies of protecting the employees' free selection of representative and of fostering stable bargaining relationships. They recognize the employer's interest in not dealing with a minority union, while ensuring that the employees' own choice on union representation is respected and that established bargaining relationships are afforded some measure of stability. The courts have recognized the Board's primary role in developing and applying standards which achieve a fair balance of these statutory policies. See *N.L.R.B. v. Frick Co., supra*, 423 F.2d at 1332 ("This is an area which involves the weighing of two conflicting goals of national

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[12] The quoted phrase from *Tragniew* is part of a fuller statement on presumptions generally: "Presumptions in the law are a procedural substitute for evidence. They recognize the probability of a fact and impose the proof of the non-existence of that fact upon the party against whom the presumption is asserted. [Citation omitted.] The presumption of majority representation here is rebuttable by clear, cogent and convincing evidence." *Id.* at 674-675.

labor policy: preserving employees' free choice of bargaining representatives, and providing the stability for established bargaining relationships. In this situation we believe that 'the Board should be left free to utilize its administrative expertise in striking the proper balance' "). Thus, even when disagreeing with Board factual findings, the courts are careful, in this area, not "to open doors long since closed or to give assurance to employers that they are free to [withdraw recognition and] instigate negotiations unilaterally under the thin guise that the employers are simply dealing with an endemic disaffection with the union, and thereby discourage and destroy employees' interest in union representation." *N.L.R.B. v. Gallaro, supra,* 419 F.2d at 101.[13] Tested under these principles, we

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[13] As indicated above, the Board's standards represent a fair, judicially endorsed balancing of the relevant statutory rights and objectives. We submit that *amicus curiae's* appraisal of statutory interests (Br. 19-23) would not achieve a proper balance in that it slights stability of bargaining relationships and the self-determination rights of employees while going far beyond what is needed to protect the employer's interest in not bargaining with a minority union. To our knowledge, *amicus'* position has not been adopted by any court.

Amicus also errs in suggesting (Br. 14-18) that Section 9(c)(1) of the Act requires the Board to use identical evidentiary prerequisites for conducting representation elections on employee/union and employer petitions. That Section does direct the Board to proceed to an election "if it has reasonable cause to believe that a question of representation . . . exists." But in determining "reasonable cause," the Board need not disregard the obvious differences between an employer's challenge to an incumbent union carrying a presumption of majority status and employee/union requests for initial elections. The differences in labor relations setting, statutory interests, and source of evidence clearly warrant the Board's requirement of "reasonable grounds" for believing the union has lost its majority in the former situation, and of a 30 percent "showing of interest" in the latter. See, Board's Statements of Procedure, 29 C.F.R. Sec. 101.17, 101.18; *United States Gypsum Co.*, 157 NLRB 652 (1966).

submit that the Board properly found that the Employer unlawfully withdrew recognition and refused to bargain with the Union on and after April 19, 1973.[14]

The Employer does not dispute that the Union enjoyed a presumption of continuing majority support; nor does it seriously challenge the applicable evidentiary standards described above (Br. 26-27).[15] Its quarrel is with the application of those standards to the facts presented here. As set out in detail below, the Employer had, as a basis for its withdrawal of recognition on April 19, certain employee statements indicating dissatisfaction with the Union. After withdrawing recognition, the Employer sought additional support for its action by (1) systematically questioning

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[14] The Employer's claim (Br. 63-64) that the issue of "denial of recognition was not alleged in the complaint or litigated at the hearing is patently without merit. The Employer's refusal to bargain on and after April 19 was clearly specified in the complaint (A. 8a); and the "denial" or "withdrawal" of recognition was the basic way in which the Employer manifested its refusal to bargain. From the complaint and the course of the litigation, the Employer was made well aware that the legality of its April 19 withdrawal of recognition was squarely in issue.

[15] The Employer does suggest (Br. 40-42) that the Board's "objective considerations" test for a reasonable doubt conflicts with court decisions stating that the employer must produce enough evidence to cast a "fair" or "serious" doubt of the incumbent union's majority status. See, *Lodges 1746 and 743, I.A.M. v. N.L.R.B.*, 416 F.2d 809, 811-812 (C.A.D.C., 1969), cert. denied, 396 U.S. 1058; *N.L.R.B. v. Anvil Products, Inc.*, 496 F.2d 94, 96 (C.A. 5, 1974); *National Cash Register Co. v. N.L.R.B.*, 494 F.2d 189, 194 (C.A. 8, 1974). However, an examination of those decisions indicates that the courts were analyzing the same factors in light of the same principles as the Board considers under its "objective considerations" standard. Thus, the phrase "fair" or "serious" doubt does not reflect a different standard, but merely another way of describing the Board's "objective considerations" criteria. As the Board has stated, "the standard of 'serious doubt' as employed by the courts is not more or less than the standard the Board sets out when it states that 'reasonably based doubt' must be based on 'objective considerations' and raised in a context 'free of unfair labor practices' . . ." *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association*, 213 NLRB No. 74, p. 9, 87 LRRM at 1197.

its employees on May 21 as to their involvement in union activities, and (2) by seeking to elicit evidence of union membership and support at the August 1973 hearing before the Administrative Law Judge. The Board found that the evidence of reported employee dissatisfaction prior to withdrawal of recognition was insufficient to establish a reasonable doubt of the Union's majority status and that the evidence sought to justify the withdrawal after the fact was tainted by illegality or otherwise not probative of an actual loss of majority. We submit that the record amply supports these Board determinations.

B. The Board properly found that the Employer failed to demonstrate that it had an objective basis for doubting the Union's majority status.

As indicated in the Counterstatement (*supra*, pp. 5-6), the Employer abruptly withdrew recognition from the Union on April 19, 1973, on the bare assertion that the Employer doubted that the Union represented a majority of the employees in the unit. When pressed for the basis for that "doubt," Employer Attorney Lewis cited no supporting facts, but merely repeated the claim of a "reason to believe" the Union did not represent a majority (A. 74a; 147a-148a). Similarly, the Employer's April 20 petition for a Board election also lacked any evidence to support the asserted doubt (A. 74a; 222a). Nonetheless, before the Board, the Employer advanced three factors which allegedly formed the basis for its April 19 "doubt": (1) substantial turnover among employees in the unit, (2) inactivity of the Union, and (3) employee statements made to Employer representatives indicating certain discontent with, or lack of interest in, Union activity (A. 75a-79a). Before this Court, the Employer

has abandoned the first two contentions and relies solely on the employee statements to justify its withdrawl of recognition (Br. 36-39).[16]

The evidence of reported employee dissatisfaction is contained in the testimony of Manager Altman and Supervisor Brault. According to these Employer representatives, 14 of the 28 unit employees expressed some form of discontent with the Union prior to April 19. The Board determined that the Brault-Altman testimony on the remarks of six employees – Campbell, Johnson, Lewis, Testamark, Goldman and Wolf – did not provide "clear or firm enough indications" that these six employees no longer wanted the Union to represent them and that such testimony did not rise to the level of objective considerations warranting a reasonable doubt of the Union's majority (A. 78a-79a). The Board made no findings as to the remarks of the other eight employees since, even assuming these eight did clearly communicate their repudiation of the Union to the Employer representatives, such repudiation would not provide any basis for believing the Union had lost its majority in the 28-employee unit (A. 79a).[17] Thus, the question raised is whether the Board properly found that the remarks of the six employees, as testified to by Altman and Brault, did not constitute objective evidence justifying a reasonable doubt of the Union's majority. The evidence as to the six employees' statements may be summarized as follows:

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[16] The Board had ample grounds for rejecting the first two assertions (A. 77a-78a). As indicated in the Counterstatement (*supra*, pp. 4-5), the Union and its employee-members were openly active during the contract term and the employee complement in the unit did not substantially change between the November 1971 election and the April 1973 withdrawal of recognition.

[17] The testimony on the eight employees' remarks is summarized in the Administrative Law Judge's decision (A. 75a-76a) and set forth at the following pages of the Appendix: A. 301a (Avella), 304a-305a (Downward), 305a-307a (Garofalo), 308a (Griffen), 310a-311a (Kim), 312a-313a (Levy), 314a-315a (Maciulla), and 315a-316a (Turner).

Lena Campbell. Supervisor Brault testified that he had "only one" conversation with employee Campbell, in which Campbell objected "quite strongly" to the treatment of another employee (pharmacist Kim) by the "[Union] people" (A. 76a, 78a; 301a-302a). According to Brault, this conversation took place "probably some time early April or thereabouts" (A. 302a).

Paul Johnson. Brault testified that he had "frequent" conversations with employee Johnson and that, on "one particular occasion" after the November 1971 election, Johnson asked "if there was anything we could do about getting the [the Union] off Ms. Kim's back or something to that effect" (A. 76a, 78a; 309a-310a).[18]

Connie Lewis. Brault testified that he had one conversation with pharmacist Lewis sometime during "approximately the first three months or so" of 1973 (A. 76a; 314a). Brault initiated this conversation after hearing that the Union was now "going after" Lewis. When he asked if anyone was bothering her, Lewis replied "that she didn't bother with the [Union] at all" (A. 76a, 78a; 313a-314a).

Beverly Testamark. Brault also testified that he had one conversation with employee Testamark after receiving a report that she "was being approached" (A. 76a, 78a; 315a). Brault asked if Testamark was "being bothered" and she replied "that she also had no time for the [Union]" *(Ibid.).*

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[18] Manager Altman also attributed to pharmacist Johnson a comment, "probably" in the first part of 1973, that the Employer should spend more time trying to "get rid" of the Union rather than "pacifying it". This comment was made in response to Altman's representation that certain changes Johnson wished to have put into effect by the Employer might have to be discussed with the Union before being implemented (A. 75a; 251-252a).

Benjamin Goldman. Brault testified that in a conversation which took place "some months ago" but "definitely" prior to April 19, he asked employee Goldman if the Union was "bothering" him (A. 76a, 79a; 308a-309a). According to Brault, Goldman ". . . replied that he didn't have any use for them. These are basically his words" (A. 76a, 79a; 309a).

Alfred Wolf. Brault testified that he had three or four conversations with employee Wolf, extending back before the election, and that Wolf would ". . . complain fairly frequently about the noise and the meetings, the gatherings that were going on [that] he attributed to the [Union] people" (A. 77a, 79a; 317a-318a).

These remarks clearly do not furnish objective evidence which would give rise to a reasonable doubt of the Union's majority. The substance of the six employees' statements is devoid of any indication that they no longer wanted the Union to represent them. Three of these statements (Lewis, Testamark, and Goldman) came in response to Brault's inquiry as to whether "[Union] people" (A. 311a) were bothering them. The employees replied simply that they "didn't bother with the [Union] at all" (Lewis, A. 313a-314a), "have no time for the [Union]" (Testamark A. 315a), and "didn't have any use for them" (Goldman, A. 309a). These answers, which as recounted are not even particularly responsive to the question asked, do not rise to the level of an expression of a desire not to be represented by the Union. At most, the import of these remarks is, as the Board found (A. 78a-79a) that the employee did not actively participate in the Union.[19] Employees may desire the benefits

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[19] The Employer cannot avoid the import of these statements by engrafting its own view of what certain phrases mean "to the average layman" or "as a colloquialism" (Br. 38). There is nothing in the record to indicate that "not bother with the Union" or "no time for the Union" connotes a disavowal of union representation, rather than a simple lack of interest or time for union activity (A. 78a-79a).

(continued)

of union representation and still not wish the burdens of active participation in their union. This is especially true where, as here, there is no contractual requirement of union membership. *Terrell Machine Co. v. N.L.R.B., supra,* 427 F.2d at 1090 (in the absence of a contract clause requiring membership, "many employees are content neither to join the union nor give it financial support but to enjoy the benefits of its representation. Nonetheless, the union may enjoy their support, and they may desire continued representation by it"). The comments of employees Campbell, Johnson and Wolf merely conveyed disagreement with specific actions of the Union or its members. Thus, Campbell and Johnson voiced their concern over what they perceived to be the unfair treatment of employee Kim by some union members (A. 302a, 310a), but in protesting that treatment of Kim, the two employees were clearly not rejecting the Union as their representative (A. 78a). Employee Wolf's complaints about noisy gatherings, even if properly attributable to the Union, do not reflect a repudiation of the Union as employee representative. As the Board held (A. 78a), "Disagreement with the policies of a representative does not mean that one has abandoned support of that representative." See *Gulf Machinery Co.*, 175 NLRB 410, 413-414 (1969). See also, *Allied Industrial Workers, Local 289 v. N.L.R.B., supra,* 476 F.2d at 881; *N.L.R.B. v. Frick Co., supra,* 423 F.2d at 1333-1334 (returning to work despite union's strike action does not indicate repudiation of union as bargaining representative). In sum, there is nothing in these six statements which would provide an objective basis for believing that these employees did not want to be represented by the Union.

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[19] (continued) Indeed, the Employer failed to call any employee witnesses to confirm the asserted "colloquial" meaning or even to corroborate the Brault/Altman version of what, if anything, they said about the Union.

Moreover, the failure of these statements to provide an objective basis for questioning the Union's majority is also manifested in the imprecise nature of the Altman/Brault testimony (A. 78a-79a). Thus, Brault was extremely vague as to the dates of the conversations with the six employees, placing them "approximately the first three months or so" of 1973 (A. 314a), "some months ago" (A. 309a), subsequent to the November 1971 election (A. 310a), and "probably some time early in April or thereabouts" (A. 302a). Brault also displayed uncertainty over the content of the employees' remarks by qualifying his testimony with such phrases as "or something to that effect" (A. 310a) and "basically his words" (A. 309a). The testimony of Manager Altman further illustrates the nebulous, subjective nature of the Employer's evidence of a "doubt." Thus, Altman testified that Brault had informed him the employees were "unhappy" with the Union and that Brault had made up a list of those he "figured" were "possibly in favor of the [Employer]" (A. 75a; 258a-259a, 269a). According to Altman, Brault confirmed the list by describing "his observations, his opinions, from his discussions with the employees" (A. 259a).[20] Such "figuring" and "opinions" clearly do not provide an objective, rational basis for doubting the Union's majority. And despite the weaknesses in the testimony of the Employer representatives, the Employer declined the invitation of the Administrative Law Judge to call employee witnesses to corroborate the remarks about the Union assertedly made to Brault and Altman (A. 87a; 390a, 391a).[21]

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[20] Brault did not testify about any "lists" and none were produced at the hearing (A. 79a, n. 14). It should also be noted that nothing was said about Brault's "lists", "observations" or "opinions" at the April 19 meeting with Union Attorney Lechner (*supra*, pp. 5-6).

[21] As the Board has stated, "To be of any sigificance, the evidence of dissatisfaction with a validly recognized incumbent Union must come from the employees themselves, not from the employer on their behalf." *Terrell Machine Co.*, 173 NLRB 1480, 1482 (1969), enf'd., 427 F.2d 1088 (C.A. 4, 1970).

In short, the Employer's evidence with respect to the six employees does not rise to the level of "objective considerations"; it represents rather the assertions of Employer representatives based on their own subjective views of the employees' desires for Union representation. See cases cited *supra*, pp. 11-12. The Employer is thus left with evidence that eight employees out of a unit of 28 expressed an interest in not being represented by the Union.[22] Assuming, as the Board did (A. 79a), that the Brault/Altman testimony as to these eight employees did indicate their withdrawal of support for the Union, such a showing in no way establishes a reasonable doubt of the Union's majority status. Under the accepted evidentiary test (*supra*, pp. 11-12), a reasonable doubt must be cast upon the union's *majority;* evidence of a minority's repudiation of the union is simply not enough. See, *N.L.R.B. v. Little Rock Downtowner, Inc., supra*, 414 F.2d at 1092 (evidence that 4-6 employees out of 60-65 employee unit expressed disinterest in the union did not support a "good faith doubt of the union's majority status"); *N.L.R.B. v. Cayuga Crushed Stone, Inc., supra*, 474 F.2d at 1383. The Board here properly focused on the Union's majority, rather than "a large number" or "sizable portion" of the unit (Er. Br. 41), in determining whether the Employer had adduced sufficient evidence to justify withdrawing recognition.[23] In sum, the Employer has failed to carry its burden of demonstrating, by objective evidence, a reasonable doubt of the Union's majority status (A. 79a). Plainly the Employer's withdrawal of recognition on

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22 This would appear to demonstrate a gain in Union support since there were 10 "no" votes in the November 1971 election (A. 73a; 31a).

23 Contrary to the Employer's suggestion (Br. 42, n. 39, and see *amicus* Br. 16-17), this majority aspect of the "reasonable doubt" test is not altered by the Board's rules governing employee decertification elections. While the Board requires only a 30 percent "showing of interest" (usually employee signatures on cards or a petition) to conduct a decertification election, that showing emanates from the employees and

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April 19 was accomplished without the requisite evidentiary showing and thus violated Section 8(a)(5) and (1) of the Act.[24]

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[23] (continued) is subject to a Board investigation as part of its inquiry into whether a "bona fide question concerning representation" exists. Board's Statements of Procedure, 29 C.F.R. Sec. 101.18. And most importantly, the 30 percent showing results in an election among the employees who have the final say on continued union representation. This is a far different situation from an employer's unilateral withdrawal of recognition from an incumbent union, based solely on his own evaluation of the employees' union sentiment, and accomplished without the Board's first determining the existence of a genuine representation question. This employer withdrawal situation is clearly governed, not by the 30 percent rule, but rather by the requirement of an objectively based, reasonable doubt of the incumbent union's *majority* status. The Board's holding in *Telautograph Corp.*, 199 NLRB No. 117, 81 LRRM 1337 (1972) is not to the contrary. That decision merely held that where a question concerning representation has been shown to exist under a decertification petition, the employer may suspend bargaining with the union until the representation question is resolved in the election. The Board specifically held that this "rule does not apply in situations where, because of contract bar, certification year, inadequate showing of interest, or any other established reason, the decertification petition does not raise a real representation question." 199 NLRB No. 117, at p. 2, 81 LRRM at 1337-1338. In the instant case, there was no decertification petition; the Employer's petition did not raise a genuine question concerning representation (for lack of timely filing and of supporting evidence of employee repudiation, A. 74a); and the eight employees assertedly expressing their rejection of Union representation do not even constitute 30 percent of the 28-employee unit. Thus, even if the decertification election rules did apply here (which, as we have shown, is not the case), there would be no basis for the Employer's withdrawal of recognition on the facts presented.

[24] Since the Employer was not justified in its withdrawal of recognition, the Employer's subsequent unilateral change in the pharmacists' work week (A. 85a) was a further violation of Section 8(a)(5) and (1) of the Act. *Terrell Machine Co. v. N.L.R.B., supra*, 427 F.2d at 1091; *N.L.R.B. v. Little Rock Downtowner, supra*, 414 F. 2d at 1092, n. 6.

C. The Employer's evidence sought to justify withdrawal after the fact is not probative of an actual loss of majority.

Before the Board, the Employer also attempted to defend its refusal to bargain on grounds that the Union had in fact lost its majority on April 19. See *Orion Corp., supra,* 210 NLRB No. 71, p. 5, 86 LRRM at 1194. (". . . if an employer does not establish that it had a reasonable doubt when it ceased bargaining, it can defend against an 8(a)(5) allegation only by showing actual loss of majority as of the date of withdrawal of recognition"). The Employer here does not contend that it had any evidence of actual loss of majority as of April 19, when it withdrew recognition. It does contend that it was entitled to gather such evidence in two ways: (1) by conducting the May 21 poll of the employees' involvement in union activities, and (2) by seeking to introduce certain union records and employee testimony into the record at the August 14-15, 1973, hearing before the Administrative Law Judge. However, as the Employer recognizes (Br. 28), proof of actual loss of majority must be affirmatively shown by "competent" evidence. See cases cited *supra,* pp. 12-13. The Board could reasonably view with some skepticism the competency of evidence issuing from the Employer's "after-the-fact" search for proof. As the Board observed in connection with the May 21 poll, "An employer may not withdraw from a bargaining relationship without adequate objective evidence to justify its action, and thereafter utilize a poll, the results of which may well have been skewed by the employer's unlawful withdrawal of recognition, to attempt to justify that self-same unlawful withdrawal. Such a 'bootstrap' defense is not, in our view, well-founded" (A. 118a).[25] We turn now to the relevance and reliability of the evidence that the Employer sought to adduce at the hearing.

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[25] The Employer's May 21 conduct is discussed *infra,* pp. 30-41.

1. Union records of membership and dues

The Employer obtained a pre-trial subpoena for the production of "All books, records, documents, papers and other evidences of membership . . ." and of "All . . . [written] evidences . . . of initiation fee and dues payments . . ." for unit employees in the years 1971-1973 (A. 64a). At the hearing, the Administrative Law Judge quashed the subpoena on grounds that the material sought was irrelevant to the issues raised (A. 327a, 69a). That ruling was clearly proper. As noted above (*supra*, pp. 12-13, 15), the Union enjoyed a presumption that a majority of the employees in the unit wanted the Union to represent them; and it was incumbent upon the Employer to rebut that presumption with reliable, convincing evidence of actual loss of majority. The subpoenaed records of membership and dues payments would not provide such evidence to rebut the presumption, since there is no necessary correlation between these factors and a desire to be represented by a union for purposes of collective-bargaining. See, *N.L.R.B. v. Master Touch Dental Laboratories, Inc.*, 405 F.2d 80, 83 (C.A. 2, 1968); *Terrell Machine Co. v. N.L.R.B.*, *supra*, 427 F.2d at 1090; *N.L.R.B. v. Gulfmont Hotel Co.*, *supra*, 362 F.2d at 592. And, this is especially so where, as here (A. 73a; 33a-47a), the contract does not provide for the checkoff of union dues or for compulsory membershp as a condition of employment. See, *Terrell Machine*, *supra*, 427 F.2d at 1090; *Gulfmont Hotel*, *supra*, 362 F.2d at 592. Thus, the subpoenaed documents were properly excluded as not relevant evidence of an actual loss of majority.[26]

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[26] The subpoenaed material was equally irrelevant to the Employer's asserted "doubt" of the Union's majority status. The fact that the subpoena was sought in itself indicates that the Employer did not possess (and thus could not have considered) such material on April 19, when it withdrew recognition. As noted above (*supra*, p. 12), it is settled that later learned facts will not provide support for an accomplished withdrawal of recognition.

2. The offer to prove lack of majority support through employee testimony

The Employer also sought to rebut the Union's presumption of majority through the testimony of the 28 employees in the unit. Thus, it offered to prove that ". . . if these people were called, the majority of the employees would indicate and would testify, would state under oath, that on the 19th of April they did not support the Union and they were not members of the Union" (A. 86a; 391a). The offer of proof developed as an aftermath to the Employer's motion to dismiss the complaint's allegation of unlawful polling on May 21. In colloquy, counsel for the Employer indicated that if that motion was granted, the Employer intended to use the responses to that poll in interviewing the employees to determine "whether and which employees we should call as witnesses" (A. 86a; 382a-383a, 387a). Counsel further conceded that no one had talked to the employees after the May 21 polling (A. 86a; 383a-384a, 387a). When the Administrative Law Judge declined to dismiss the Section 8(a)-(1) polling allegation, the Employer made the offer of proof described above. In rejecting that offer, the Administrative Law Judge made it clear that he was not curtailing any proof of employee union sentiment which was communicated to the Employer before April 19, but that he was rejecting examination of employee witnesses as to their "uncommunicated state of mind" (A. 87a; 390a, 391a). It is thus evident that the Employer was seeking not to introduce existing evidence of loss of majority, but rather to subject the employees to another round of questioning (in pre-trial interviews and examination at the hearing) into their union activities. In these circumstances, the Judge properly rejected the offer.

An offer of proof is not a device to probe for evidence one does not have but hopes to somehow uncover during examination of the witness. "The offer must be a presentation of evidence *actually available.*"

I Wigmore on Evidence (3rd Ed.) §17. See also, McCormick, *Handbook on Evidence* (1954), §51, pp. 112-113. Here, the Employer did not claim to have evidence of actual loss of majority when it withdrew recognition on April 19; and its counsel conceded that they had not talked to the employees since the unlawful polling on May 21. The results of that poll plainly are not reliable indication of the employees' true representational desires, for its coercive nature aside, the poll failed to elicit the key factor of whether the employees wanted the Union to represent them (A. 81a, 87a; 92-93). Thus, the Employer had no facts in its possession which would back up the offer to prove that a majority on April 19 did not "support," and were not "members" of, the Union.[27] The Board could reasonably conclude that, "to use the shop-worn phrase, . . . counsel was proposing a fishing expedition, hoping to gather some evidence to support [the Employer's] position" (A. 87).

The Board further noted the inherent unreliability of employee testimony in August as to their uncommunicated sentiments on union representation four months and several unfair labor practices before. Under the Employer's procedure, each employee would be called to testify and subjected to probing questions as to his state of mind on the Union back in April. Such examination would be conducted in the presence of Employer officials and the attorneys who had interrogated the employees on May 21 (A. 87). The employees would also confront the fact that the Employer had withdrawn recognition, unilaterally changed job terms,

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[27] It should also be noted that membership is not determinative of the employees' representational interest (*supra*, p. 25), and that the Employer's concept of "support," as evidenced in its May 21 questionnaire (A. 92-93), extended to such extraneous matters as payment of dues and attendance at union meetings.

and engaged in extensive interrogations prior to the hearing. In this setting the Employer's attempt to elicit testimony on the employees' uncommunicated representational wishes four months before would yield only unreliable evidence of actual union support.[28] The Board properly concluded that, "[e]ven if this [testimonial procedure] were permissible under other circumstances, the coercive nature of the investigation and the unreliability of anything that could result from it are other reasons for denying it" (A. 87). In so ruling, the Board was clearly not imposing any "irrebuttable presumption" or "denial of due process" (Er. Br. 33). It was simply requiring convincing, competent evidence of an actual loss of majority.[29]

And finally, the Employer contends (Br. 34, 42) that, upon a showing of "reasonable doubt," the burden shifted to the General Counsel to come forward with evidence that the Union in fact represented a majority. However, as demonstrated above, the Employer here failed to satisfy

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[28] In the situation of initial claims for recognition based upon employee authorization cards, the Supreme Court has "reject[ed] any rule that requires a probe of an employee's subjective motivations as involving an endless and unrealiable inquiry." *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969). The Court accepted "the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union" *(Ibid.)*. See also, *International Union, U.A.W. v. N.L.R.B. (Preston Products Co.)*, 392 F.2d 801, 807-808 (C.A.D.C., 1967), cert. denied, 392 U.S. 906 (employee testimony on card signing discounted since they were "testifying under the eye of the company officials about events which occurred almost a year before and prior to the activities which were subsequently found to constitute unfair labor practices").

[29] See, *e.g.*, *Wigwam Stores, Inc.*, 193 NLRB 471, 472 (1971) (presumption of majority rebutted by evidence that all four employees in unit signed letter to Board requesting a decertification election).

its burden of showing a reasonably grounded good-faith doubt of the Union's majority status. The Board thus had no occasion to decide whether, given such a showing, the General Counsel assumed the burden of going forward with evidence of the Union's actual majority. It should be noted, however, that this concept of a "shifting burden" was first expressed as a minority view in *Stoner Rubber Co.*, 123 NLRB 1440, 1445 (1959) in the context of employer unilateral changes implemented without advance notice of a "good-faith" doubt. The concept has not been adopted by a majority of the Board. *Automated Business Systems*, 205 NLRB No. 35, at p. 12, 84 LRRM at 1047; *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association*, 213 NLRB No. 74, at p. 9, n. 19, 12, n. 21, 87 LRRM at 1197, 1198; *United Supermarkets, Inc.*, 214 NLRB No. 142, p. 6, n. 10, 87 LRRM 1436, n. 10 (1974). See also, *N.L.R.B. v. Dayton Motels, Inc.*, 474 F.2d 328, 331-332 (C.A. 6, 1973) ("A good-faith doubt exculpates the employer even if the Union in fact represented a majority of the employees . . ."). But cf. *N.L.R.B. v. Superior Fireproof Door & Sash Co.*, 289 F.2d 713, 719 (C.A. 2, 1961); *Automated Business Systems v. N.L.R.B.*, 497 F.2d 262, 270-271 (C.A. 6, 1974).[30]

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[30] The Sixth Circuit's decision in *Automated Business Systems* does not militate against the Board's findings here. *Automated* involved an employer who had reasonable grounds for doubting the union's majority, but who subsequently engaged in unfair labor practices interfering with an employee-initiated election to decertify the union. The court rejected the Board's reliance on the presumption of continuing majority for purposes of entering a bargaining order remedy for the employer's election interference, and remanded the case to the Board for a hearing on the union's majority status. 497 F.2d at 272, 276. In the court's view, the presumption could not be maintained in the face of the employer's prior good-faith doubt and the Board's exclusion of probative evidence on the union's actual majority (*i.e.*, the number of employee signatures on cards supporting the decertification petition). 497 F.2d at 271-272, 276. The court's holding is inapposite here since: (1) the Employer has not shown a "reasonable doubt," (2) the Board has not excluded competent, relevant evidence of the Union's actual majority, and (3) the instant withdrawal of recognition situation is far removed from the rather unique circumstances presented in *Automated*.

In sum, the Employer has failed to supply the evidentiary showing required to justify a withdrawal of recognition; it has not demonstrated either "objective considerations" giving rise to a reasonable doubt of the Union's majority or affirmative proof by competent evidence of an actual loss of majority. Under the applicable principles, the Board was amply warranted in finding the Employer's April 19 refusal to bargain was violative of Section 8(a)(5) and (1) of the Act (A. 85).

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE EMPLOYER VIOLATED SECTION 8(a)(1) AND (5) OF THE ACT BY COERCIVELY QUESTIONING ITS EMPLOYEES.

As shown in the Counterstatement (*supra*, pp. 7-9), three Employer attorneys, utilizing a lengthy questionnaire, interrogated virtually all the employees in the bargaining unit concerning their union activity. This systematic interrogation took place on May 21, about a month after the Employer withdrew recognition from the Union and just seven days after the Union filed unfair labor practice charges based on that withdrawal.[31] The Union was not notified or consulted about the interrogations (A. 85; 356a). The employees were called away from their workplace for individual questioning, which was preceded by the attorney's reading a prepared statement asserting that the Employer did not "feel" that the Union had the support of the employees and that the attorney ". . . therefore would like to ask you a few questions to assist in the preparation of a defense" to the Union's unfair labor practice charge (A. 91a). The "few" questions turned out to be 46 in number, starting with the employee's name and continuing through a detailed examination

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[31] The questionnaire and its prefatory statement had been prepared before the charge was filed with the Board on May 14 (A. 334a-335a).

of the entire spectrum of employee involvement in membership, dues and assessments, meetings, communications, and other aspects of union activity (A. 92a-93a). The questions even delved into employee knowledge of the Union's officers, its address and telephone number, its Constitution and by-laws, its contract with the Employer (including the termination date), and the Union's handling of grievances *(Ibid.)*. Counsel for the Employer testified that the purpose of this extensive interrogation was "to be able to present [evidence of] no majority in fact on the date of the refusal" as an "alternative defense" to the Section 8(a)(5) violation charged (A. 80a; 342a-343a).[32] However, both the context (*i.e.*, following the withdrawal of recognition) and nature of the questioning indicate that the interrogations did not have such a limited purpose. In light of all the surrounding circumstances, the Board reasonably found that the May 21 polling of employees was coercive, and was not privileged either as *bona fide* testing of the Union's actual majority or as proper preparation for trial.

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[32] Counsel stated that the poll was not directed at ascertaining "objective considerations" supportive of a reasonable doubt of majority status (A. 80a, n. 17; 343-a). Counsel had assumed at the time that the Employer "probably" had objective considerations; he wanted "to prepare the defense on the second alternative, which was no majority in fact on the date of the refusal. The only way I could do this was by speaking to the employees, the pharmacists themselves" (A. 342a-343a).

A. The Employer's interrogations did not conform to the Board's standards for a lawful poll to determine majority support.

In *International Union of Operating Engineers, Local 49 v. N.L.R.B.*, 353 F.2d 852, 856 (C.A.D.C., 1965), the Board was directed to "come to grips" with the "recurring problem" of systematic employer inquiry into a union's majority support and to devise "minimal standards" governing such inquiries "for the protection of the employees as to their Section 7 rights and for that of an employer acting in good faith." The Board on remand announced such standards in *Struksnes Construction Co., Inc.*, 165 NLRB 1062 (1967). The Board there stated:

> Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. (*Id.* at 1063.)

These standards were cited with approval by the Supreme Court in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 609 (1969), and have also been consistently approved by the Courts of Appeals.[33] This Court has not had occasion to pass on these standards.[34]

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[33] See, for example, *W.A. Sheaffer Pen Company v. N.L.R.B.*, 486 F.2d 180, 181 (C.A. 8, 1973); *N.L.R.B. v. Harry F. Berggren & Sons, Inc.*, 406 F.2d 239 (C.A. 8, 1969), cert. denied, 396 U.S. 823; *N.L.R.B. v. Super Toys, Inc.*, 458 F.2d 180, 182 (C.A. 9. 1972); *N.L.R.B. v. Historic Smithville Inn*, 414 F.2d 1358, 1362 and n. 10 (C.A. 3, 1969), cert. denied, 397 U.S. 908; *N.L.R.B. v. C & P Plaza Department Store*, 414 F.2d 1244, 1249 and n. 2 (C.A. 7, 1969), cert. denied, 396 U.S. 1058; *N.L.R.B. v. J.M. Machinery Co.*, 410 F.2d 587, 589 n. 3 (C.A. 5, 1969).

[34] In *N.L.R.B. v. Rubin*, 424 F.2d 748, 751 (C.A. 2, 1970), this Court noted the Supreme Court's citation of *Struksnes* in *Gissel Packing Co.*, but found that the interrogation finding could be affirmed without reaching the Board's *Struksnes* standards.

As indicated in the cases cited above, the *Struksnes* standards represent a balancing of employer and employee interests. They presuppose the existence of a valid employer reason for verifying union support among the employees. The threshold question is thus whether there is an appropriate occasion, a *bona fide* need for the employer to poll his employees on their support for the union. See *N.L.R.B. v. Yokell*, 387 F.2d 751, 755 (C.A. 2, 1967) ("We agree with the Board that the balloting here was not conducted for a proper purpose, but existed merely as a prelude to the illegal bargaining session which was to follow"). Cf. *United Aircraft Corp. v. N.L.R.B.*, 440 F.2d 85, 94 (C.A. 2, 1971) (the interrogations "exceeded legitimate bounds" since they "were not conducted solely to determine whether the no-solicitation rule had been violated"). The usual example of such an occasion is when the employer is presented with a union demand for initial recognition accompanied by a claim of majority support. In this situation, the employer may, under the *Struksnes* guidelines, seek to determine the union's actual support in order to respond to the demand for recognition. See *N.L.R.B. v. Lorben Corp.*, 345 F.2d 346, 348 (C.A. 2, 1965). Another example might be the employer who has objective considerations casting reasonable doubt on an incumbent union's majority, but who wishes to ascertain actual majority status before withdrawing recognition.[35] In both situations, the poll would serve the legitimate purpose of guiding an employer's future dealings with the union. In contrast, the Employer here had already withdrawn recognition from the Union and was utilizing the May 21 poll to "buttress its initial and shaky" basis for that action (A.

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[35] Where the employer does not demonstrate "objective considerations," the Board has held that such polling prior to withdrawing recognition is itself unlawful. *Montgomery Ward & Co., Inc.*, 210 NLRB No. 120, pp. 2-3, 86 LRRM 1273, 1274 (1974).

88a). As the Board stated, the Employer lacked any "reasonable basis" for withdrawing recognition on April 19, and "could not, after taking such action, rely on evidence of employee dissatisfaction disclosed through the expediency of a poll of its employees, whether or not such [poll] was conducted in accordance with *Struksnes* standards" (A. 118a). In other words, in the Board's view, *Struksnes* will not validate the use of a poll to develop evidence for an already accomplished withdrawal of recognition.

In any event, the record plainly shows that the Employer's May 21 polling fell far short of the remaining standards set forth in *Struksnes*. The poll was not secret; it was rather a face-to-face encounter with an Employer attorney in which the employee's name was the first item entered on the questionnaire (A. 81a; 92a).[36] The poll was also not confined to determination of the Union's actual majority, nor was any such purpose communicated to the employees. The questionnaire failed to pose the one relevant question: "Do you want the Union to represent you for purposes of collective bargaining" (A. 81a, 83a).[37] The prefatory

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[36] The fact that Employer attorneys testified that the completed questionnaires were kept "confidential" from the Employer (Er. Br. 59) does not satisfy the secrecy requirement. The attorneys were representing the Employer and its interests; employees under *Struksnes* are properly protected against disclosing their identity to any employer representative conducting the poll. In addition, the attorneys did not advise the employees that their responses were "confidential"; when asked what would happen to the forms, the attorneys indicated only that the questionnaire was for their use and would be retained by them (A. 339a, 371a). Whatever that implied, it clearly did not provide any assurance of secrecy.

[37] Others have had little trouble framing the question and so advising employees. See, *e.g.*, *N.L.R.B. v. Lorben Corp.*, *supra*, 345 F.2d at 347 ("Do you wish Local 1922 . . . to represent you?"); *N.L.R.B. v. Yokell*, 387 F.2d 751, 754 and n. 2 (C. A. 2, 1967) ("I want [or do not want] a union to represent me"); *N.L.R.B. v. C & P Plaza Department Store*, *supra*, 414 F.2d at 1248 ("How many of you people want the union as your bargaining representative?").

statement read by the attorneys not only declared that management did not "feel" the Union had the "support of the pharmacists" – thereby apprising the employees of the expected answers – but also failed to advise them of the purpose, stating only that the questions were related to the "preparation of a defense" on unspecified union unfair labor practice charges (A. 81a; 91a). This hardly notified the employees that the poll was directed solely at ascertaining actual support for union representation. And such a purpose was lost completely in the welter of questions that followed. Thus, the 46-item questionnaire touched upon everything but the employees' continued interest in having union representation (A. 92a-93a). The information that was elicited related to the inner workings of the Union (*e.g.*, its officers, amount of dues and assessments, frequency of meetings, and communications to members) or to the employee's personal experiences and recollections on a wide variety of union activities (*e.g.*, payment of dues and assessments, attendance at union meetings, awareness of constitution, bylaws, and contract with the Employer, and satisfaction with Union handling of grievances). Moreover, before the Board (A. 84a, n. 34) and before this Court (Br. 60, 62), the Employer has conceded that the questionnaire was in part designed to uncover factors pertaining to employee credibility, preparation for cross-examination, and the issue of the Union's "viability."[38] If the purpose were to determine actual majority, the attorneys were plainly making that determination turn upon their own "subjective evaluation of the responses" (A.

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[38] The "viability" issue related to one of the factors which the Employer initially relied on for "objective considerations" (*supra*, p. 16). To the extent that the interviewing attorneys injected this issue into the May 21 polling, they contradicted attorney Darby's testimony that the poll was not directed at ascertaining "objective considerations." See n. 32, *supra*.

84a, n. 34). It is, however, readily apparent that the attorneys were not seeking verification of the Union's majority status, but were rather probing the employees' inner thoughts on the Union and the precise extent of their participation in union activities.[39] Such in-depth interrogation, while not accompanied by any overt hostility towards the Union, clearly tended to restrain and coerce the employees' free selection of the Union as bargaining agent and their free participation in union activities.[40] In sum, the May 21 polling went far beyond the safeguards established in *Struksnes* (A. 81a), and was thus violative of Section 8(a)(1) of the Act.

The Employer contends (Br. 49-58) that its May 21 polling should be tested, not under the *Struksnes* standards, but rather, under the criteria set forth in this Court's decision in *Bourne v. N.L.R.B.*, 332 F. 2d 47, 48 (C.A. 2, 1964). We submit that the systematic polling of unit employees represents a special type of interrogation, that the Board's *Struksnes* standards constitute a sound resolution of the competing statutory interests in this situation, and that these standards were properly applied in the instant case. However, it also appears that, even under the *Bourne* criteria, the Employer's May 21 poll would be unlawful. In

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[39] Amicus asserts (Br. 32-34) that the in-depth questioning was permissible on grounds that it (1) served as "background . . . to verify the extent" of support for the Union, (2) uncovered the employees' "bias for or against the Union" or their "subjective attitudes towards the Union," and (3) explored the "candor of the potential witness and his powers of perception and recollection." Plainly, interrogation aimed at discovering "bias," "candor," or "subjective attitudes" do not serve any legitimate employer interest; they serve only to inhibit employees' free participation in union activity.

[40] In light of this coercion and the Employer's failure to consult the Union, the Board could reasonably find that the interrogations also served to undermine the Union's status as bargaining representative, in violation of Section 8(a)(5) of the Act (A. 85a). See *Montgomery Ward & Co., Inc.*, 210 NLRB No. 120, p. 3, 86 LRRM 1273, 1274 (1974).

applying *Bourne*, this Court has required that there be a legitimate employer need for questioning the employees. See, *N.L.R.B. v. Milco, Inc.*, 388 F.2d 133, 137 (C.A. 2, 1968) (a key factor is "whether the employer seeks information necessary to test a claimed majority or seeks to ferret out information most useful for purposes of discrimination"); *N.L.R.B. v. Lorben Corp., supra*, 345 F.2d at 348 (the employer "had a valid purpose in conducting the poll, namely, to determine whether the union represented a majority of its employees for the purpose of deciding whether recognition should be extended"). As noted above, the Employer here had no legitimate purpose in questioning the employees; rather, it was attempting to gather "evidence" to bolster its already accomplished withdrawal of recognition. In addition, the Court has indicated that all five *Bourne* factors need not be present to support a finding of coercive interrogation. *N.L.R.B. v. Scoler's, Inc.*, 466 F.2d 1289, 1291 (C.A. 2, 1972); *N.L.R.B. v. Rubin*, 424 F.2d 748, 751 (C.A. 2, 1970); *N.L.R.B. v. Gladding Keystone Corp.*, 435 F.2d 129, 132-133 (C.A. 2, 1970).

Thus, the May 21 interrogations took place in the context of the Employer's continuing refusal to bargain and clearly conveyed its hurried effort to gather support for that refusal. The interviews were also conducted in an atmosphere of "unnatural formality" (*Bourne* No. 4). Thus, the employees were called away from their work and isolated with an attorney for the Employer. The attorney read from a prepared statement which mentioned defending "unfair labor practice charges"; he then proceeded to enter employee responses on the form for the questionnaire (*supra*, pp. 7-8, 35). While the attorneys were not high in the Employer's hierarchy, they could be reasonably viewed by the employees as having much influence with the Employer and considerably more authority than a low-level supervisor (*Bourne* No. 3). Compare: *N.L.R.B. v. Dorn's Transportation Co., Inc.*, 405 F.2d 706, 712 (C.A. 2, 1969) ("the questioners were at the lowest level of the supervisory hierarchy and were on

friendly terms with the employees"). The attorneys also went far beyond a casual, general inquiry into the employees' representational desires; they probed many facets of the employees' union activity, seeking information that would be useful for purposes other than merely testing the Union's majority (*Bourne* No. 2). See, *N.L.R.B. v. Syracuse Color Press, Inc.*, 209 F.2d 596, 599-600 (C.A. 2, 1954); *N.L.R.B. v. Scoler's, Inc., supra,* 466 F.2d at 1291; *N.L.R.B. v. Gladding Keystone Corp., supra,* 435 F.2d at 132. We submit that these factors provide sufficient support for the Board's finding of coercive interrogation under the *Bourne* criteria.

B. The Employer's interrogations exceeded the bounds of legitimate preparation for trial

The Board and the courts have long recognized "a delicate balance between the legitimate interest of the employer in preparing a case for trial and the interest of employees in being free from unwarranted interrogation." *Texas Industries, Inc. v. N.L.R.B.*, 336 F.2d 128, 133 (C.A. 5, 1964). Accord: *Amalgamated Clothing Workers (Winfield Mfg. Co.) v. N.L.R.B.*, 424 F.2d 818, 825 (C.A.D.C., 1970); *N.L.R.B. v. Lindsay Newspapers, Inc.*, 315 F.2d 709, 710-711 (C.A. 5, 1963). In defining the scope of privileged trial preparation, the Board has established "specific safeguards designed to minimize the coercive impact of such employer interrogation." *Johnnie's Poultry Co.*, 146 NLRB 770, 774-775 (1964), enforcement denied, 344 F.2d 617 (C.A. 8, 1965).[41] The courts have

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[41] Other safeguards require that the employer (1) communicate the purpose of the questioning to the employee, (2) provide assurances against reprisal and obtain employee participation on a voluntary basis, and (3) conduct the questioning in a context free of hostility and coercion. *Johnnie's Poultry Co., supra,* 146 NLRB at 775.

also recognized that "an employer may question his employees in preparation for a hearing, but is restricted to questions relevant to the charges of unfair labor practice and of sufficient probative value to justify the risk of intimidation which interrogation as to union matters necessarily entails." *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F.2d 732, 743 (C.A.D.C., 1950), cert. denied, 341 U.S. 914. As the Fifth Circuit has stated, "Accommodation of these [employer and employee] interests requires that the scope and manner of permissible questioning be strictly confined to the necessities of trial preparation." *Texas Industries, Inc. v. N.L.R.B., supra,* 336 F.2d at 133. See also, *Surprenant Mfg. Co. v. N.L.R.B.*, 341 F.2d 756, 762-763 (C.A. 6, 1965) (". . . the privilege is a narrow one. The interrogation is limited to the purpose of preparing the case for trial. It does not include the right to pry into matters of union membership [or] to discuss the nature or extent of union activity . . ."); *N.L.R.B. v. Buddy Schoellkopf Products, Inc.*, 410 F.2d 82, 88 (C.A. 5, 1969). Cf. *N.L.R.B. v. General Stencils, Inc.*, 438 F.2d 894, 898-899 n. 3 (C.A. 2, 1971) (interrogation of employee Kretschmer served "no legitimate employer interest" and thus it was unnecessary to determine whether the questioning was "only and in good faith" for trial preparation).[42]

In the instant case, the Board first observed that the Employer's May 21 action was essentially a wide-ranging poll of the employees' involvement in union activity, which did not "fit" the category of preparation for trial (A. 82a). But even assuming the standards for trial preparation were applicable, the Employer's May 21 questioning went far beyond what was necessary to defend against the Section 8(a)(5) charge.

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[42] The Eighth Circuit's denial of enforcement in *N.L.R.B. v. Johnnie's Poultry Co.* 344 F.2d 617 (C.A. 8, 1965) was based on a differing appraisal of the record evidence; the court did not question the propriety of the Board's safeguards. See *N.L.R.B. v. Neuhoff Bros. Packers, Inc.*, 375 F.2d 372, 378 n. 11 (C.A. 5, 1967).

As noted above, the Employer's 46-item questionnaire failed to ask whether the employees wanted the Union to continue to represent them in collective bargaining. Thus, it omitted the one factor relevant to a defense for the Employer's withdrawal of recognition from the incumbent Union. And the questions that were asked plainly "fail the test of relevancy" (A. 83a). As indicated more fully above, the questions probed into the internal affairs of the Union, the employees' subjective attitudes towards the Union, and the precise extent of their involvement in union activities. None of this detailed examination was even remotely related to the charge of an unlawful refusal to bargain. And, whatever value the "credibility-testing" questions (*supra*, pp. 35-36) had as trial preparation, it was clearly outweighed by the probing, coercive nature of such questions. Such questioning plainly went "far beyond the legally imposed grounds by asking employees about their attitude toward the union" (*N.L.R.B. v. Buddy Schoellkopf Products, Inc.*, *supra*, 410 F.2d at 88), and pried into "matters of union membership . . . [and] the nature or extent of union activity" (*Surprenant Mfg. Co. v. N.L.R.B.*, *supra*, 341 F.2d at 763). In short, the Employer's extensive questioning clearly falls outside the "area of permissible inquiry" (A. 117a-118a, 83a-85a).[43]

The Employer has thus attempted to cover its coercive interrogations with an improper "blend" of legal principles (A. 82a). If this were permitted, the Board's *Struksnes* standards for polling could be evaded through the simple expedient of labelling coercive polling "preparation for trial"

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[43] We submit that the cases relied upon by the Employer (Br. 61) are distinguishable on their facts and that they do not represent a "principle of liberal discovery" in Board proceedings. Contrary to the suggestion of the Employer (Br. 61) and *amicus* (Br. 32-36), respondents in unfair labor practice proceedings are not entitled to pre-trial discovery. *N.L.R.B. v. Interboro Contractors, Inc.*, 432 F.2d 854, 857-859 (C.A. 2, 1970), cert. denied, 402 U.S. 915.

(A. 82a). The Board rightly rejected such an approach and found the Employer's May 21 polling violative of Section 8(a)(1) of the Act (A. 117a-118a, 80a-85a).[44]

III. SECTION 10(e) OF THE ACT PRECLUDES THE EMPLOYER FROM RAISING ISSUES RELATING TO THE BOARD'S AUTHORIZATION OF A SECTION 10(j) PROCEEDING.

The Employer contends (Br. 10-25) that it was error for the Board to decide the case after authorizing the General Counsel to institute proceedings for temporary relief under Section 10(j) of the Act.[45] In the

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[44] The Employer's claim (Br. 66-67) that the Section 8(a)(1) polling issue should have been severed from the trial of other issues is based on its view that the May 21 questioning was valid trial preparation. However, as shown above, the Board had ample grounds for rejecting that view. And in allowing an amendment to the complaint to cover the May 21 polling, the Board was not inhibiting the Employer's lawful preparation of a defense or denying it the right to effective representation. The Board was simply requiring the Employer and its counsel to stay within the limits of lawful interviewing (A. 85a-86a, 88a). Nor can the Employer demonstrate any prejudice flowing from the joinder of the Section 8(a)(1) polling issue with the Section 8(a)(5) refusal to bargain issue. Such joinder merely avoided the time and expense of a second hearing. As the Fifth Circuit has recognized, ". . . it is consonant with efficient Board administration to allow collateral unfair labor practices stemming directly from the company's preparation of its defense to be disposed of in the same proceeding." *Texas Industries, Inc. v. N.L.R.B., supra,* 336 F.2d at 132.

[45] Section 10(j) provides, in pertinent part, as follows: "The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States District Court, within any district wherein the unfair labor practice in question, is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition, the court . . . shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper."

Employer's view, such authorization violated the separation of functions under the Act and constituted *ex parte* consideration of evidence in the case. We submit that these matters are not properly before the Court under Section 10(e) of the Act.

As indicated above, the hearing in this case was held on August 14-15, 1973. On September 7, 1973, the Board's General Counsel, acting through the Regional Director for Region 5, instituted proceedings against the Employer under Section 10(j). On October 26, the District Court for the District of Columbia entered an order which, pending final disposition by the Board, enjoined the Employer from interfering with employee statutory rights and directed it to recognize and bargain with the Union. *Humphrey v. Retired Persons Pharmacy*, 84 LRRM 2599, 2601-2602 (D. D.C., 1973).[46] On October 30, the Administrative Law Judge issued his decision finding the Section 8(a)(5) and (1) violations described above. On November 15, the Employer filed over 155 exceptions to the Judge's decision, but failed to cite any impropriety in the Board's accepting and resolving the issues raised (A. 95a-115a).[47] On December 19, the Employer also moved for leave to present oral argument before the Board (A. 116a), but it again failed to mention any impediment in the Board's deciding the case.[48]

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[46] The Employer's appeal of that order was, by stipulation of the parties, dismissed as moot following the issuance of the Board's decision and order (C.A.D.C., order dated June 27, 1974, 73-2168).

[47] If the Employer genuinely believed that the Board was disqualified from reviewing the Administrative Law Judge's decision, it is difficult to understand how the Employer could raise so many exceptions before the Board without once adverting to any "disqualification" to resolve them.

[48] Nor did the Employer raise its objections by way of a motion for reconsideration following the Board's decision. See *Glaziers' Local No. 558 v. N.L.R.B.*, 408 F.2d 197, 202-203 (C.A.D.C., 1969).

It is thus plain that the Employer had the opportunity to raise its Section 10(j) contentions before the Board and failed to do so. The Employer's attempt to raise these issues in this Court for the first time is expressly precluded by Section 10(e) of the Act, which provides: "No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This provision reflects "the salutory policy . . . of affording the Board opportunity to consider on the merits questions to be urged on review of its order." *Marshall Field & Co. v. N.L.R.B.*, 318 U.S. 253, 256 (1943). As the Supreme Court has also stated, ". . . orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the court." *U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952). See also, *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961); *KFC National Management Corp. v. N.L.R.B.*, 497 F.2d 298, 300 n. 1 (C.A. 2, 1974) (Section 10(e) precludes "parties from raising their objections for the first time in the reviewing courts"); *N.L.R.B. v. Ra-Rich Mfg. Corp.*, 276 F.2d 451, 454 (C.A. 2, 1960). This principle applies to questions of procedural due process and the Board's interpretation of the Act, as well as to Board factual determinations. See *Marshall Field & Co. v. N.L.R.B., supra*, 318 U.S. at 256; *N.L.R.B. v. Ra-Rich Mfg. Corp., supra*, 276 F.2d at 454; *N.L.R.B. v. Operating Engineers, Local 66*, 357 F.2d 841, 846-847 (C.A. 3, 1966); *N.L.R.B. v. Tennessee Packers, Inc.*, 344 F.2d 948, 949 (C.A. 6, 1965). See also, *International Paper Co. v. F.P.C.*, 438 F.2d 1349, 1357-1358 (C.A. 2,

1971), cert. denied, 404 U.S. 827.[49] The Employer here plainly did not afford the Board an opportunity to consider the Section 10(j) arguments now advanced in this Court.

The Employer argues (Br. 25, n. 22) that its failure to raise these issues was excused by "extraordinary circumstances," but, the circumstances relied upon fall considerably short of "extraordinary." Thus, the Employer asserts that, since the Section 10(j) record was not part of the record in the unfair labor practice case, it could "not except to an occurrence therein" (Br. 25, n. 22).[50] But the Employer's contentions are not directed at findings of fact based upon record evidence; the Section 10(j) "occurrence" (namely, the Board's authorization to proceed) is relied upon as a legal bar to the Board's consideration of the unfair labor practice case. That alleged disqualification is not dependent upon the inclusion or exclusion of the record in the 10(j) proceeding. Thus, the state of the record in no way precluded the Employer from raising its contentions before the Board. The fact that the Board – as distinguished from the

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[49] *International Paper* involved a contention similar to that raised by the Employer here. Thus, the company there alleged that the Commission's general counsel had "participated in both the prosecution of the proceeding against International and in the ultimate formulation of the Commission's decision." *Id.* at 1357. This Court declined to rule on the merits of such a contention on grounds that the company had not raised it before the Commission. "This knowing inaction and calculated lying in wait, taken with the hope of upsetting a future adverse decision of the Commission, constituted a waiver of [the company's] rights" *(Ibid.)*.

[50] The fact that the Employer could not have raised its contentions before the Administrative Law Judge (Er. Br. 25, n. 22) is beside the point. Section 10(e) requires that objections be presented to *the Board* before they may be raised in court. See, *N.L.R.B. v. Operating Engineers, Local 66*, 357 F.2d 841, 844-846 (C.A. 3, 1966). This requirement is particularly pertinent here, since the "disqualification" allegedly inheres in the Board, not the Administrative Law Judge or his findings and conclusions.

Administrative Law Judge – had not yet "decided the §8(a)(5) case adversely to the [Employer]" (Br. 25, n. 22) also affords no excuse for failing to file exceptions. Every respondent taking a case before the Board is in the same position; if exceptions were excused every time "prejudice" had not been manifested in an adverse Board ruling, there would be little, if anything, left to the "salutory principle" of Section 10(e). *Marshall Field, supra,* 318 U.S. at 256. It is thus clear that the Employer has not presented any "extraordinary circumstances" which would excuse its failure to raise its 10(j) contentions before the Board. *N.L.R.B. v. Local Union No. 74, International Association of Marble, Slate and Stone Polishers,* 471 F.2d 43, 45-46 (C.A. 7, 1973); *N.L.R.B. v. Ferraro's Bakery, Inc.,* 353 F.2d 366, 367-368 (C.A. 6, 1965) and cases there cited.[51]

In sum, the Employer is attempting to raise an issue which it withheld from the Board. The issue is an important one in that it touches upon the relationship between the Board and its General Counsel. We submit that it would be highly inappropriate for the Court to rule upon the matter when the agency itself has not addressed the issue in this case. In the event that the Court finds that Section 10(e) does not bar the Employer's Section 10(j) contentions, we respectfully request that the

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[51] The Employer's reliance (Br. 25, n. 22) on *N.L.R.B. v. Lundy Mfg. Co.,* 286 F.2d 424, 426 (C.A. 2, 1960) and *N.L.R.B. v. Richards,* 265 F.2d 855, 862 (C.A. 3, 1959) is misplaced. In those cases the absence of exceptions was excused by the fact of an intervening Supreme Court decision *(Lundy)* or a favorable ruling from the Trial Examiner *(Richards).* No such situation is presented here.

case be remanded to the Board for the purpose of stating the Board's position on these issues.[52]

CONCLUSION

For the foregoing reasons, we respectfully submit that a judgment should be entered denying the petition to review and enforcing in full the Board's order.

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December, 1974.

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[52] While not addressing the merits of the Employer's contentions, we would like to point out that (1) the Board's revised delegation of Section 10(j) authority to General Counsel was first adopted in 1950 (15 Federal Reg. 6924, October 14, 1950), not 1955 (Er. Br. 12), (2) the court in *Evans v. International Typographical Union*, 76 F. Supp. 881, 886-888 (S.D. Ind., 1948) upheld the Board's statutory authority over Section 10(j) proceedings, as well as the validity of its original, full delegation of that authority to General Counsel, and (3) the claim that the Board's authorization of Section 10(j) relief precludes impartial consideration of the case following full hearing was rejected in *N.L.R.B. v. Richard W. Kaase Company*, 346 F.2d 24, 28 (C.A. 6, 1965).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

RETIRED PERSONS PHARMACY t/a NRTA-AARP PHARMACY,	)	
Petitioner,	)	
v.	)	No. 74-1651
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D.C.

this 6th day of December, 1974